United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1340

To be argued by
PETER FLEMING JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1340

UNITED STATES OF AMERICA,
Appellee,

v.

JAMES D. HANLON, COSTAS NASLAS, and
PAUL KATRITSIS,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS HANLON, NASLAS, AND KATRITSIS

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Preliminary Statement

James D. Hanlon, Costas Naslas, and Paul Katritsis appeal from judgments of conviction entered on July 26, 1976 after trial before the Honorable Milton J. Pollack and a jury

A. The Indictment

Indictment 75 Cr. 515 was filed on May 30, 1975. It contained 127 counts and charged ten defendants with various violations of the federal mail, wire, and bank fraud statutes. 18 U.S.C. 1341, 1343, and 1014. Eight separate conspiracies also were alleged. 18 U.S.C. 371.

The essence of the 127 counts was that certain of the defendants on various occasions obtained millions of dollars

of bank loans by means of false and fraudulent representations as to the value of the collateral and, in some instances, as to the purpose of the loans.

The loans all were ship loans. The alleged misrepresentations were either as to the purchase price of the ship, the value and even the existence of the ship's charter, or the identity of the loan recipient.

B. The Information

Information 75 Cr. 1176 was filed on December 14, 1975. It charged the payment and receipt of bribe monies to and by the three men who comprised the Ship Loan Department of the National Bank of North America ("NBNA"). Of the three appellants, only Naslas was named as a defendant or conspirator in the Information.

C. The Issue at Trial

Fraud and bribery were conceded. The only issue was whether the appellants knowingly participated in and assisted those crimes.

D. The Defendants Not on Trial

Harry Amanatides, a Greek-American, was the founder of Tidal Marine International, Inc. ("Tidal"), a shipping company which was the beneficiary of all the loans. Amanatides was in Greece at the time of the indictment and trial.

Ion Livas, an English citizen, was Amanatides' principal cohort and in November 1971 became Tidal's chairman. Livas was last known to be in London.

Michael Blonsky, an English citizen, worked with Amanatides and Livas in London. His whereabouts are unknown.

Gregory Spartalis, Joseph Metzger, and John Shevlin comprised the Ship Loan Department at NBNA. Spartalis is in Greece and has not been tried. Metzger was tried in March 1976. He was convicted of misappropriation and

acquitted of bribery. Shevlin pleaded guilty to one count of misappropriation and one count of bribery. He testified thereafter as a prosecution witness in this trial and in Metzger's and received a suspended sentence.

Mark Scufalos, a Greek citizen, was a cohort of Amanatides in Greece. Scufalos pleaded guilty to two false statement counts. He testified thereafter as a prosecution witness and received a suspended sentence.

Michael Panayotopoulos purchased two ships from Tidal in December 1971 and February 1972. He pleaded guilty to one count of making a false statement and received a fine of $1,500. He did not testify as a prosecution witness.

E. The Defendants on Trial

James D. Hanlon is an attorney who has practiced admiralty law since 1958. Hanlon met Amanatides in 1961 and became one of several outside counsel to Tidal in 1969. His principal work was in connection with Tidal's ship financing. Until Tidal collapsed in 1972, Hanlon spent some 95% of his professional time on Tidal matters.

Costas Naslas emigrated from Greece to the United States in 1956. He met and became a friend of Amanatides in 1957, and joined Tidal in 1969, a year after it was organized.

Paul Katritsis is Amanatides' nephew. Deserted by his father in 1950, when Katritsis was an infant, Katritsis and his mother lived with Amanatides in New York until Katritsis was eleven. In January 1972, Katritsis began to work on a full-time basis for his uncle at Tidal.

Statement of Facts

The evidence of fraud was so intricate and complex as to defy its simple telling. It was established by sufficient and undisputed proof of fraud both from within and without major banks. Whether the banks in fact were fooled may remain a question. But there is no question that false

collateral was presented to secure ship loans and that massive internal corruption existed at the National Bank of North America.

The only contested issue was whether the defendants on trial knew of the fraud and bribery, and knowingly participated therein. We believe the question of knowledge was extremely close, so much so that we will submit that the evidence was legally insufficient on many of the counts which were tried. Finally, we believe that any fair statement of the evidence will show just that.

A. Ship Loans

Banks lend mortgage money for the purchase of ships. As collateral, the banks ordinarily receive a mortgage on the vessel and an assignment of the charter hire (A. 265).

Ships are rented. The lease is called a charter. The charter ordinarily is for a fixed period of time and guarantees payment to the shipowner of a fixed compensation for cargo carried (A. 265).

B. The Undisputed Fraud

Between its organization in 1968 and its demise in 1972, Tidal purchased 41 ships. It was known as the fastest growing shipping company in the world. A public company, its stock traded into the high teens (A. 341, 1358).

The acquisition of this fleet followed an ordinary pattern. Tidal would find a ship for sale and finance its purchase. Appraisals were sometimes required. Collateral was always required. The bank always received a first mortgage on the vessel and an assignment of the charter hire (A. 265).

The fraud alleged was in two forms. There was undisputed evidence that a ship's purchase price was sometimes misrepresented, and that charters were presented as collateral which either were fictitious in that they did not exist, or were false in that their actual term, *e.g.*, three years, was falsely represented to be longer, *e.g.*, five years (A. 377). We believe the prosecution will concede that every fictitious

or false charter was prepared in Tidal's London office under the direction of Livas, Amanatides, and Blonsky.

The fictitious charters simply were printed, typed, and signed. The false charters were falsified by xerox. The true charter was xeroxed in masked out form. False longer terms of charter then were typed and the "new" charter was again xeroxed. Authentic corporate stamps were xeroxed from the genuine charter, appended to the "new" raised xerox copy, and the charter was signed and xeroxed again. The result was a xerox copy of a charter which had been raised in term, appropriately stamped, and signed with a fictitious name (A. 844).

The banks accepted these falsified xerox copies as proof of what they contained. Insofar as appears, no bank ever asked to inspect an original charter, and no unindicted banker ever caught on. The banks were represented by counsel at every closing. These lawyers reviewed the documents and inspected the xerox charters. None found or ever suspected fraud (A. 290-91).

The second form of fraud was less imaginative. By mid-1971, Tidal owed NBNA more than $10 million. NBNA decided not to extend further credit. Tidal nonetheless financed additional ships at NBNA. It did so by having Mark Scufalos pose as a borrower in place of Tidal on three occasions (A. 270, 294-95).

C. Bribery

The evidence of bribery was simple. Shevlin, the convicted banker, said that in November 1971 Amanatides offered to pay Spartalis, Metzger, and Shevlin $70,000 each in return for their cooperation in approving certain future financings. Shevlin said that he and Metzger received a total of $45,000 of the $70,000 promised to each. There were four payments of $10,000 each and one of $5,000. According to Shevlin, the first was received from Amanatides at the bank on December 24, 1971. The second was received from Amanatides in his office in early January

1972. The third was received from Naslas in his office in late January 1972. The fourth was received from Naslas in the lobby of Tidal's office building in late February 1972. The fifth was received from Amanatides in March (A. 930-46).* Over $400,000 also was paid by Levas to Spartalis through Swiss bank accounts.

While the evidence of bribery was simple, the verdict was strange.

Shevlin said the five payments were on December 24, 1971, and in early January, late January, late February, and late March 1972. Naslas was charged substantively in connection with only three of these five payments: early January, late January, and late February (Counts 3, 4, and 5). He was convicted on Counts 3 and 4, the early January and late January payments. He was acquitted on Count 5, the late February payment.

What is strange is that Shevlin, the only accuser, made no mention of Naslas in connection with the early January payment (Count 3). Shevlin said *that* payment was made by Amanatides *alone* in Amanatides' office. But Naslas nevertheless was convicted of that payment. Since Shevlin was the only accuser, how was Naslas convicted on a count where Shevlin did *not* accuse him? The answer lies in the prosecution's offer and argument of its other alleged "evidence" of Naslas' complicity

Naslas wrote and cashed two checks in the amount of $20,000, payable to cash, on January 6, 1972 (early January) and January 28, 1972 (late January), respectively. This coincided both in time and in amount with Shevlin's timetable of payments. It was precisely this coincidence which the prosecution argued as clinching Naslas' guilt (A. 1578). The argument was premised upon two other facts. Each check was marked in its corner as representing money for the master of the vessel Aquario. But the Aquario operated in the Caribbean and, as Naslas admitted, monies

*Shevlin testified to the same transactions during Metzger's earlier trial. Metzger was acquitted of all bribery counts and, for reasons later stated, Shevlin's testimony at Naslas' trial should have been excluded.

for its operation ordinarily were transferred from New York to Venezuela by wire and not in cash.

The prosecution argued that the checks therefore could not have been to raise cash for the Aquario, that Naslas must have known this, and that Naslas therefore must have known that the cash proceeds were for some other purpose, namely, the prosecution argued, for bribery (A. 1575-80).

One fact is clear from the jury's verdict. Naslas was found guilty of the payments which coincided with the checks—early and late January—and was found not guilty of the payment which did not, late February. An incongruity resulted. When Shevlin said he was paid by Amanatides, and a check was cashed, Naslas was convicted. When Shevlin said Naslas paid him, and a check was cashed, Naslas was convicted. When Shevlin said Naslas paid him, and a check was *not* cashed, Naslas was acquitted.

The jury obviously found that the checks were indeed the source of the bribe monies in early and late January. And those were the *only* payments of which they convicted Naslas, even though Shevlin said the early January payment was made by Amanatides, and even though Shevlin said Naslas himself made a payment in late February.

The most rational conclusion is that the jury disbelieved Shevlin, since it acquitted Naslas of the late February payment, but believed the checks, and convicted Naslas as an aider and abetter who provided, as opposed to delivered, the bribe monies in early and late January.

The jury was assisted in this determination by a statement which Naslas made to the prosecutors on October 3, 1975, *four days before* Shevlin's lawyer made Shevlin's deal with the prosecution (A. 1727, 1898) and eleven days before Shevlin ever personally accused Naslas (A. 1009). In an account which he repeated at the trial (A. 1205), Naslas told the prosecutors that he had been in charge of Tidal's Christmas Party which was held on December 22, 1971. Photographs were taken and Naslas was in charge of delivering sets of photographs to various guests, including Shevlin and Metzger. He received the photographs in late

December or early January. He sorted them into envelopes for mailing. Amanatides told him not to mail Shevlin's and Metzger's since both were coming to Tidal's offices. Naslas held the envelopes on his desk. Late one afternoon, Amanatides brought Shevlin and Metzger into Naslas' office. An envelope of photographs was given to each. After Shevlin and Metzger left, Amanatides came into Naslas' office, laughing raucously, and told Naslas "You won't have any more trouble with John Shevlin. You just paid him $10,000." Naslas thought Amanatides was fooling. He paid close attention to Shevlin thereafter and found him "as annoying as ever."* He concluded that Amanatides had been joking (A. 1897).

Since guilt by aiding and abetting is guilt in any event, none of this matters but for one observation. Conviction of aiding and abetting requires proof of criminal knowledge. Even if the checks were in fact the source of the bribe monies in early and late January, Naslas was not guilty of aiding and abetting unless he actually knew this. Our point is that he may *not* have had actual knowledge, but that Judge Pollack's "recklessness instruction", POINT II, *infra*, was so erroneous as to open the very real possibility that Naslas was convicted of aiding and abetting on a "should have known" theory of criminal knowledge.

D. Evidence of Fraud

1. *Ilion, Marilion, Harilion, and Kyrilion (Count 10—Hanlon)*

In October 1970, at Blonsky's request from London, Hanlon formed a Tidal subsidiary with the name Unimar Seetransport GMBH (A. 1209). In December 1970 Livas negotiated the financing of the four ships at NBNA and said the four ships cost $2.7 million (A. 267). In fact, they had cost $2.1 million.

On January 14, 1971, Blonsky wired NBNA from London

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* Shevlin often contacted Naslas about the cash condition of various Tidal accounts at NBNA.

that two of the vessels were chartered to Mitsui Line and Port Line/Blue Funnel Line, respectively. Both were well-known shipping companies (A. 1435).

The loans closed in late January and February 1971. The bank received assignments from Tidal of charter hire from Mitsui Lines, Port Line/Blue Funnel Line, Japan Line, Ltd., another well-known carrier, and Unimar Seetransport GMBH, apparently the same company which Hanlon had formed three months earlier at Blonsky's request (A. 1351-52). In fact, there were no such charters (A. 645-53).

Subsequently, in August 1971, again at Blonsky's request, Hanlon organized two Tidal subsidiaries named Port Line/Blue Funnel Line of London, Ltd., and Mitsui-O.S.K. Lines K.K. of Tokyo, Ltd. (A. 1389-90).

2. *Trechon (Counts 18 and 22—Hanlon)*

John Sheneman, a former deputy attorney general of the United States, was Hanlon's friend and law partner. Sheneman was told by one Captain Huerta that a ship, the Petrolasa, was for sale at a distress price of $3.5 million. Sheneman told Hanlon, who offered the ship to Tidal (A. 750-52).

Purchase of the Petrolasa, renamed Trechon, was financed at Bank of America, London. Bustard, the loan officer, testified he dealt only with Livas and Amanatides. Bustard said a line of credit was opened for Tidal which limited loans on any one ship to 75% of purchase price or appraisal value, whichever was lower (A. 193). He said the Trechon was appraised at $6.6 million. He said Amanatides or Livas told him the purchase price was $5.5 million. The Bank loaned $4 million (A. 194).

Hanlon, Sheneman, and Huerta received $750,000 as a finder's fee. That amount was openly transferred from the loan proceeds to Kowloon Tankers, Ltd., a foreign corporation formed and owned by Hanlon. Hanlon transferred $325,000 to Sheneman, who swore it was a finder's fee, and $150,000 to Captain Huerta (A. 777). The government con-

ceded the payments to Sheneman and Huerta were bona fide finders' fees (A. 1699).

The loan was disbursed to Tidal before its credit agreement with the banks was finalized. That agreement was negotiated and drafted in London. Hanlon was in New York and did not participate. In January 1971, a month after the loan closed, Hanlon received a draft of the agreement for review. The draft contained the loan limitation of no more than 75% of purchase price or appraised value, whichever was lower (A. 1472, 1617).

3. *Six Ships (Count 36—Hanlon)*

In March 1971 Amanatides agreed to purchase twelve ships owned by Scufalos' company, Union Commercial Steamship Co., a Greek entity. By July, the purchase of six of the ships remained unfinanced. Amanatides told Scufalos in London to go to New York and tell Metzger, the NBNA loan officer, that Scufalos wanted a loan on the six ships to buy out his (Scufalos') partners. Metzger agreed to the loan. The loan fact sheet named Scufalos as the borrower. The purported purpose of this sham was to evade the bank's decision to limit Tidal's credit to its current amount outstanding (A. 310-11).

Hanlon attended the closing and acted as attorney-in-fact for the six Tidal subsidiaries which obtained the loan. There was no evidence that Hanlon knew of the Scufalos sham or any of its surrounding facts. Scufalos, a prosecution witness, swore he had not told Hanlon. The bank's attorney, Tublin, never told Hanlon that the bank thought Scufalos was the borrower. Indeed, Bachman, the senior bank officer who testified to Tidal's credit restriction, swore he never told Hanlon of the purported credit restriction, much less of the Scufalos sham (A. 289).

Nor was there any circumstantial evidence that Hanlon knew of the Scufalos sham. Each of the six borrowing corporations was a Tidal subsidiary formed by Hanlon and bearing names of stars, as was Hanlon's habit with Tidal. The officers of these subsidiaries all were persons whom

Hanlon knew to be associated with Tidal, including Katritsis, who was not charged in this count, and Katritsis' mother, who was Amanatides' sister (A. 1386).

The conspiracy charged in this count was to violate 18 U.S.C. 1014, which prohibits false statements to banks in loan applications. The only false statement alleged was that "Mark Scufalos was seeking a loan to acquire the interests of his partners in six vessels" (A. 42-43).

4. *Tekton and Tropis (Counts 51, 56, 57, 58, and 59—Hanlon, Naslas, Katritsis)*

In February 1971 Amanatides purchased the Tekton and Tropis from Karageorgis, a Greek shipowner. The purchases were financed at Bank of America, London. At that time both vessels were chartered to BP Tankers, Ltd. for a period of three years each. Hanlon was at the closing.

The vessels were refinanced at NBNA in December 1971. Prior to the closing, in London, Amanatides, Livas, and Blonsky falsely raised the term of the genuine BP charters from three to five years. Copies of the raised charters were mailed to NBNA as evidence of collateral (A. 479-80).

At the closing, Katritsis signed the assignments of charter hire on each ship. He also signed a form Equalization Tax letter for each ship, attached to the back of which was a form which stated that Union Commercial Shipping Co. owned Aries Navigational Corp. ("Aries") and Pisces Navigational Corp. ("Pisces"), the borrowing corporations. The stockbooks of Aries and Pisces however, which had been in Hanlon's office since 1970, contained a September 15, 1970 receipt evidencing delivery of 500 shares of each corporation to Galaxy Steamship Corp., a Tidal subsidiary. The receipt was signed by Anna Diaz, Hanlon's secretary.

On December 30, Naslas signed a power of attorney on behalf of Aries authorizing the registration of the Tropis in Panama.

Count 51 charged conspiracy to make false statements to the bank in connection with the Tekton and Tropis refinancing. Katritsis is charged with false statements in

signing the assignments of the charter hire on the vessels, and in signing the Equalization Tax letter with its attachment representing that Union Commercial Shipping Co. owned Aries and Pisces, the borrowers. Hanlon is charged with falsely representing that Union Commercial Shipping Co. owned Aries and Pisces. We do not know or understand the charge against Naslas, although he is named as a defendant-conspirator.

Counts 56 and 57, which were substantive, charged Katritsis and Hanlon with the same misrepresentations as to the ownership of Aries and Pisces.

Counts 58 and 59, which also were substantive, charged Katritsis with the same false statements in signing both the assignments of charter hire.

5. *Aris (Counts 62 and 63—Naslas)*

In November 1971, Michael Panayotopoulos agreed to purchase two ships from Tidal. The Aris was financed by Panayotopoulos at NBNA on December 29, 1971. A five year charter from Wintershall A.G. of Kassel, Germany, was presented as collateral. In fact the five-year term was false. A genuine Wintershall charter existed on the Aris, but its actual three year term had been raised falsely to five years by Amanatides, Livas, and Blonsky in London.

In November 1971, Naslas signed as a witness to Amanatides' signature on the genuine three year Wintershall charter. His witness signature appears on the sixth page of that charter. The term of the charter appears on the first page of the charter, and does not appear on the sixth page (A. 1279).

In connection with the subsequent sale of the Aris to Panayotopoulos, Naslas signed a nine page contract which on its third page represented that the Wintershall charter was for five years. Count 62 charged Naslas as a conspirator based upon his execution of this contract containing this false term. Count 63, which was substantive, charged Naslas with a false statement for the same reason.

6. *Tachys (Counts 65 and 66—Hanlon, Naslas, and Katritsis)*

Amanatides also sold the Tachys to Panayotopoulos, who financed the purchase at NBNA on February 4, 1972. The Tachys was one of the vessels purchased from Karageorgis in February 1971. It then was operating under a three year charter to BP Tankers. Amanatides transferred that charter to another vessel however and, when the Tachys was sold to Panayotopoulos, the Tachys was unchartered (A. 535).

To remedy this "slight" defect, Amanatides, Livas, and Blonsky, in London, through xerography, transformed the original three year BP charter into a false five year BP charter. Their art had improved to the point where their final product even included a facsimile of the genuine BP corporate stamp. The false charter was mailed to New York (A. 841-48).

Katritsis was an authorized officer of Spartan Endeavor, the Company in which Panayotopoulos took title to the Tachys. He signed the Tachys charter for Spartan (A. 1318). George Axiotakis, another Tidal employee, was Spartan's secretary upon incorporation. As is usual, Axiotakis resigned shortly after the closing. NBNA thereafter discovered it had failed to obtain a secretary's certificate to the charter's validity. It delivered a back-dated certificate to Katritsis who took it to Axiotakis for execution. Axiotakis asked Katritsis if it were all right to sign a back-dated certificate. Katritis replied: "It is okay, the lawyers know about it, you can go ahead and sign it." Axiotakis, a prosecution witness, said he then jokingly asked Katritsis whether there was anything wrong with the charter. Katritsis replied: "Come on George, stop fooling around and sign it" (A. 561).

Naslas signed a closing document which recited the existence of a five year charter with BP (A. 1222).

Hanlon wrote a letter to the bank's counsel in which he stated that Spartan Endeavor, the borrowing company, had

done no business other than to enter into a charter with BP Tankers (A. 1402).

About a month after closing, the bank had not received any charter hire on the Tachys. Martin, its lawyer, inquired of Naslas who checked with London and reported that the Tachys was in port for repairs. Martin checked with BP and found there was no five year charter on the Tachys. He told Shevlin, the corrupt loan officer, but he did not tell anyone else involved in the loan including Hanlon, Naslas, or Katritsis (A. 525-26, 536-38).

Count 65 charged conspiracy to violate 18 U.S.C. 1014 by representing that the Tachys was under charter for five years to BP (A. 75-77).

Count 66, a substantive count, charged Hanlon, Naslas, and Katritsis with the above statements about the five year charter (A. 78).

7. *Tagma (Counts 75 and 76—Hanlon, Naslas)*

The Tagma was financed by NBNA in June 1972 in London. The purchaser was Epidavros Shipping Company which purportedly was owned by Scufalos. Scufalos testified that he did not own Epidavros, that he was acting at Amanatides' request, and that his position as nominee was a sham. Scufalos said he did this to give Tidal money to pay its debts to Scufalos. Scufalos said he never told Hanlon or Naslas of the sham (A. 330-31).

Hanlon represented Epidavros on the loan in New York. He wrote a letter to Tublin, the bank's New York lawyer on this loan, which promised Scufalos' guarantee. The letter also said Scufalos owned Epidavros (A. 1406).

Naslas, with Scufalos' authority, signed an Equalization Tax letter, attached to the back of which was a form stating that Epidavros was owned by Scufalos (A. 1285).

Hanlon's bill on the Tagma closing was sent to Tidal. Hanlon delivered the papers from the New York closing to Naslas at Tidal in New York (A. 1515).

Count 75 charged that Hanlon knew Scufalos did not own Epidavros and that his letter to Tublin, the bank's counsel, was false.

Count 76 charged that Naslas knew Scufalos did not own Epidavros and that Naslas' Equalization Tax letter, with a contrary representation attached, was false.

8. *Aquario (Counts 67 and 68—Hanlon)*

In the spring of 1971 Huerta succeeded in obtaining on favorable terms a 33-month charter from Shell Oil Company of Venezuela. He contacted Sheneman in an attempt to find a vessel to perform under the charter. Sheneman told Hanlon, who in turn told Amanatides (A. 1408).

Amanatides, in London, purchased a Norwegian vessel in the name of Brent Shipping Co. for $795,000 and immediately resold it to Southeast Tanker Co. for $1.3 million. Southeast was owned 50% by Livas and Amanatides, 20% by Hanlon's company, Kowloon, 20% by Sheneman's company, West Shore Tankers, and 10% by Huerta. Hanlon filed the two bills of sale in New York on July 16, 1971 (A. 1413-15).

Purchase of the vessel was financed by Amanatides and Livas at Bank of America, London. Southeast Tankers was the borrower. The purchase price was represented as $1.3 million. A loan of $780,000 was obtained (A. 1412). No crime was charged in connection with this transaction.

The Aquario was refinanced by NBNA on February 11, 1972. Amanatides, Livas, and Blonsky raised the term of the genuine charter from 33 months to 42 months. Livas mailed Hanlon a copy of the raised charter, with a president's certificate attached on top (A. 1420). Hanlon, who knew the true term of the Aquario's charter had been 33 months, delivered the raised charter to NBNA. Hanlon denied reading the raised charter. In hotly disputed testimony, the bank's lawyer, Flemming, said Hanlon verbally advised that the charter was 42 months, the false term.

E. The Sentences

The three men were convicted on all counts except one count of bribery. On July 26, 1976, Hanlon was sentenced to five years in jail. Naslas was sentenced to three years, with all but six months suspended. Katritsis was sentenced to two years, with all but four months suspended.

POINT I

There was insufficient evidence to convict on various of the fraud and false statement counts. The evidence of knowledge was thin even where perhaps sufficient on the other counts. Utmost care therefore was required on the issue of knowledge, which was the only disputed issue.

We have stated the evidence on the fraud and false statement counts as precisely and as flatly as we can. We have not dealt with inference, pro or con. We believe that the evidence was insufficient on various counts on the issue of knowledge, even stating the prosecution's inferences as we shall. We believe also that the evidence of knowledge was paper thin, even where arguably sufficient on other counts, and even stating the prosecution's inferences as we shall.

Recognizing the concurrent sentence doctrine, our point is that various counts should have been dismissed, that the concurrent sentence doctrine should not apply in the circumstances, and that, in any event, the paper thin evidence of knowledge, even where arguably sufficient, required most careful treatment of the knowledge issue both by the prosecutor in summation and by the court in its instructions to the jury.

A. Katritsis

The counts against Katritsis all should have been dismissed. There was really no evidence that Katritsis knew

that any of the documents he signed were false. Katritsis acted always at Amanatides' direction and, since Amanatides literally had raised him from infancy, surely he had every reason to rely on Amanatides.

Katritsis did not work full-time at Tidal until January 1972 when he was 21. The charges of criminal conduct on his part were quite specific. All dealt with his execution by signature of documents which contained representations which were false in fact. The documents in question were:

(a) The assignments of the charter hire on the Tekton and Tropis. The claim was that Katritsis knew the charters were false as to their term and that his execution of the assignments constituted a false statement (Counts 51, 58, and 59).

(b) The Equalization Tax letters on the Tekton and Tropis. There was no false statement in the letters themselves, but an attachment said that Union Commercial Shipping Co. owned Aries and Pisces, the borrowing corporations. The claim was that Katritsis' signature on the letter also constituted the making of a false statement on the attachment (Counts 51, 56, and 57).

(c) The charter on the Tachys which had been raised in London from a three to a five year term and which was signed by Katritsis in New York (Counts 65 and 66).

Literally, there was no evidence that Katritsis knew any of these documents were false. Katritsis' signature, of course, is not evidence of knowledge of falsity. See *United States* v. *Lange*, 528 F.2d 1280 (5th Cir. 1976), where the Fifth Circuit held that a verdict of acquittal should have been directed despite the admitted signing by the defendant of a false statement. Judge Pollack himself appeared to have a substantial problem with Katritsis' motion to dismiss all these counts (A. 1147-1152).

The prosecution relied on certain circumstantial evidence. Joyce Walker, Amanatides' secretary in New York, characterized Katritsis as Amanatides' "confidant", for whatever that meant. She also testified that she heard Katritsis and Amanatides speaking in Greek one evening,

and heard Amanatides suddenly say in English that the earnings per share figure would never work, they would never get the loan with a figure that low. The next morning Walker noticed the figures had been retyped (A. 900). Walker never said either thing to the FBI when she was first interviewed (A. 905-10).

Finally, when Katritsis testified, he volunteered on direct examination that Amanatides once had asked him to act as nominee on a $200,000 loan for Amanatides at Chemical Bank which was subsequently repaid (A. 1190-91).

Sufficiency is a difficult question to argue since it is so much a matter of this Court's perception. We submit however that this supposedly circumstantial evidence, which actually was unrelated to any of the loan transactions or documents in question, was not sufficient to establish actual knowledge of falsity in a case where the record otherwise was completely bare of evidence on that issue.

B. Naslas

Naslas was older than Katritsis and had worked at Tidal almost from its incorporation. He owned Tidal stock worth more than $400,000. He also was convicted of bribery on or about the time of his alleged false statements. The circumstantial evidence of participation in Amanatides' affairs therefore was stronger.

Opposed to this was the evidence that Naslas formally resigned from Tidal in November 1971, before any of his alleged false statements, and remained at Tidal only until June 1972 while his successor was trained. Further, Naslas' principal duties at Tidal were operational and not financial, and there was no evidence that he was a man of any financial sophistication. Finally, Naslas sold all of his stock in March 1972 at Amanatides direction and turned over some $425,000 out of the $467,000 proceeds to Tidal. He received in return a note which paid interest only in the event of default, and which by September 1972 was worthless.

There was little if any evidence of Naslas' knowledge on the false statement counts. Again, each of those charges against Naslas was based upon his signature. The documents involved were:

(a) A December 30, 1971 power of attorney signed by Naslas as an officer of Aries, the borrowing corporation on the Tropis. The power of attorney authorized the filing of papers with the Panamanian ship registry so that the final requirement on the Tropis loan could be satisfied and the loan proceeds disbursed. The power of attorney contained no statements respecting the Tropis' charter or the ownership of Aries and no false statements of any sort. Since this power of attorney was the only act charged or proved against Naslas on the Tekton and Tropis loan, Count 51 should have been dismissed, especially since there was no sufficient evidence of his membership in the conspiracy alleged.

(b) The contract on the sale of the Aris to Panayotopoulos which contained a representation that the Aris was chartered to Wintershall A.G. for five years. The Aris in fact was chartered to Wintershall A.G. but only for three years. The prosecution's claim that Naslas knew the falsity was based entirely upon the fact that Naslas had *witnessed* Amanatides' signature on the genuine three year Wintershall charter in November 1971, about six weeks before the Aris was sold to Panayotopoulos. The prosecution argued that Naslas, since he *witnessed* Amanatides' signature on the genuine charter, must have known that the genuine charter was for three years and not for five years as represented in the contract of sale to Panayotopoulos which Naslas signed on December 29, 1971 (A. 1595).

The inference literally is no stronger than the inference that a lawyer who notarizes a partner's signature to an affidavit is aware of the contents of the affidavit.

The inference is untenable. The term of the charter does not appear on the same page as Naslas' witnessing signa-

ture, even assuming that Naslas, essentially acting as a notary, read even that page of the charter.

The prosecution also argued that Naslas convicted himself when he testified that he merely witnessed Amanatides' signature and did not read "the Aris charter" when he did so (A. 1141-42, 1595). The argument was that Naslas could not have said it was "the Aris charter" he witnessed unless he had read it. This claim really demonstrates how far the prosecution was forced to stretch in its search for evidence of knowledge. Naslas' testimony was given after six months of document discovery and review, and at a trial in which the charter was repeatedly described as "the Aris charter." His testimony obviously evidenced nothing more than a *present recognition* of what he had signed as a witness and permitted no inference of what he had known at the time of the offense.

Since the contract was the only document supporting the charges against Naslas on Counts 62 and 63, those Counts should have been dismissed.

(d) A February 4, 1972 guaranty on behalf of Tidal Marine to NBNA which in part represented that the Tachys charter was for five years. The Tachys charter in fact was for only three years, and there was evidence that the Tachys actually was unchartered. There was no evidence that Naslas knew the Tachys charter had been raised falsely from three to five years. The prosecution argued instead that Naslas knew the Tachys was actually unchartered. Its argument was based upon a claim that Naslas, who supposedly was in charge of ship operations, must have known how the Tachys was operating, and must have known also that no hire monies were being received at NBNA on the Tachys.

But the conspiracy count on the Tachys (Count 65) does not even allege that Naslas knew the Tachys was not chartered for five years, or knew that the Tachys was actually unchartered. And we find it difficult to accept as sufficient in a criminal case the inferences which the prosecution urges to support a finding of knowledge on Naslas'

part. They constituted speculation at best, since there was no evidence that Naslas knew the true terms of the Tachys' charter, or knew tha the Tachys was unchartered at the time of the loan.

Since this guaranty was the only basis for Naslas' guilt on Counts 65 and 66, those counts should have been dismissed.

(e) An Equalization Tax letter which Naslas signed in connection with the Tagma closing. The letter itself contained no false statement. Attached to its back however was a form which represented that Scufalos owned Epidavros, the borrowing corporation. The prosecution claimed that Naslas' signature, which was written on the last page of the letter, evidences that Naslas read and represented the truth of the representation made on the attachment. The inference is barely plausible, since the attachment fell after the signature page, and since there was no evidence that Naslas read it. The prosecution's only other proof of knowledge on Naslas' part was that the New York closing documents on the Tagma were sent to Naslas at Tidal's New York office. Count 76 should have been dismissed.

C. Hanlon

Hanlon was a lawyer. Ninety-five per cent of his professional time between 1969 and 1972 was spent on Tidal work. He was with Amanatides in Greece when the Tekton, Tropis, and Tachys were purchased from Karageorgis, and when the twelve ships were purchased from Scufalos. He attended most of the bank closings. He benefitted financially when he received $325,000 as a finder's fee on the Petrolasa, renamed Trechon.

But it also is true that Hanlon, who handled more than 30 closings, was accused in connection with only seven. And Hanlon, although he was in Greece during the Karageorgis and Scufalos deals, did not participate to any great extent and in effect was excluded (A. 244, 1373, 1379). Finally, Sheneman, a former deputy attorney general of

the United States, also received $325,000 on the Petrolasa transaction and testified he found nothing inappropriate in the transaction.

The circumstances, in short, cut both ways with Hanlon. And, as with Katritsis and Naslas, real evidence of criminal knowledge was paper thin, despite the suspicion which is aroused by evidence of a close association with a malefactor like Amanatides.

Sufficiency on many of the counts against Hanlon is questionable, and, on some, insufficiency is clear. The evidence upon which the prosecution relied was:

(a) Fictitious charter representations and an inflated purchase price were given to NBNA on the financing of the Ilion, Harilion, Marilion, and Kyrilion (Count 10). The evidence of knowledge on Hanlon's part was that Hanlon had organized a subsidiary, Unimar, in October 1971, four months before the loans. Unimar was named as charterer on the Ilion. Six months after the loans, Hanlon organized two subsidiaries which, at Blonsky's instructions, were named Port Line/Blue Funnel Line of London, Ltd. and Mitsui-O.S.K. Lines (U.S.A.) of Tokyo, Ltd. These names were similar to the names of the purported but fictitious charterers of the Kyrilion and the Harilion, respectively.* The prosecution's argument was that Hanlon must have known, by reason of the similarity of names, that the corporations which Blonsky asked him to form in August 1971, six months after the loans, were intended as possible cover should the fictitious charters be discovered. The argument makes no legal sense.

The corporations were formed well after the loans, their names were as dissimilar as similar and could not reasonably have been explained as the real charterers if questions were asked, there was no evidence Blonsky formed them for the purpose of cover, and in fact the companies never were

*The Kyrilion's fictitious charter was with Port Line/Blue Funnel Line. The Harilion's fictitious charter was with Mitsui Lines.

used for any purpose at all. Finally, even if an inference of knowledge were permissible from these facts, the inference only arose six months after the loans and proved nothing about what Hanlon knew when the fictitious charters were presented to the NBNA in January 1971. Knowledge after the fact does not make out the crime charged.

(b) No conduct was proved on Hanlon's part to support a claim of knowledge on Counts 18 and 22 involving the Trechon. The only false statement alleged was that Tidal had purchased the vessel for $5.5 million. Hanlon knew that Tidal instead had paid some $3.3 million. But Bustard, the loan officer, said Livas and Amanatides made the false statement, and that he had very minimal acquaintance with Hanlon (A. 210-12). Hanlon was in New York when the misrepresentation was made. There was no evidence anyone told him of the misrepresentation.

The prosecution argued that Hanlon, a month after the loan closed, received a draft of a proposed credit agreement which recited the bank's policy of limiting ship loans to 75% of purchase price or appraised value, whichever was lower. Since the bank's $4 million loan violated this limitation, the true purchase price being $3,385,000, the prosecution said Hanlon must therefore have known that the purchase price had been misrepresented. The inference does not follow. For all Hanlon might have known, the bank could have made an exception to its policy based upon the ship's real value, which was appraised at $6.6 million (A. 213). Further, Hanlon received the draft credit agreement a month *after* the loan closed. And the credit agreement was not final in any event. There was no basis for the inference that Hanlon knew of the misrepresentation at the time it was made. And certainly knowledge a month after the loan closed is not evidence that Hanlon caused the misrepresentation or was party to a scheme to make it. Counts 18 and 22 should have been dismissed.

(c) There likewise was no evidence that Hanlon knew of the only false statement alleged in Count 36, namely, that the August 1971 loan on six ships purportedly was to Scufalos to allow Scufalos to buy out his partners (A. 42-43). Even Scufalos, a prosecution witness who later received a suspended sentence, swore he never told Hanlon of the sham. The prosecution virtually admitted the absence of evidence of knowledge since its only argument was that Hanlon must have known of the Scufalos sham because Amanatides must have told him, because if Amanatides did not tell him, then Hanlon might have let the cat out of the bag by telling someone that Tidal, not Scufalos, was the borrower. The argument is so attenuated and speculative as to defy an answer. It is guesswork in a criminal case. Count 36 should have been dismissed.

(d) On February 7, 1971, Hanlon represented in a letter to Panayotopoulos that Spartan Endeavor, the purchaser, had entered into a charter with BP Tankers. The prosecutors argued that Hanlon had attended the original closing on the Tachys when Tidal purchased the vessel from Karageorgis in April 1971. Since the Tachys' charter at that time was for three years, the prosecution argued that Hanlon must have known that the Tachys' charter still was for three years when, a year later, the Tachys was sold to Panayotopoulos. This inference is too attenuated to stand. Moreover, while Hanlon admitted knowing the term of the charter when Tidal purchased the Tachys a year before, Hanlon also knew that BP had extended other charters from three to five years on the Ionic King and Ionic Queen, a fact which we believe the prosecution will not dispute (A. 1526). The fact that Hanlon once knew the term of the Tachys' original charter does not support the inference of subsequent guilty knowledge in the circumstances. Counts 65 and 66, which concerned the Tachys, should have been dismissed.

(e) On June 3, 1972, Hanlon wrote Tublin, the bank's attorney on the Tagma loan, that Scufalos' guarantee

would be forthcoming and that Scufalos was "the sole shareholder" of Epidavros, the borrowing corporation (A. 1406). Subsequently, on June 15, 1976, Hanlon was present at a pre-closing at which Naslas signed an Equalization Tax letter which said Scufalos owned Epidavros (A. 663). Scufalos testified he did not own Epidavros, but was acting as a nominee for Amanatides and Tidal. Scufalos also said he never told Hanlon (A. 328).

Again there was no direct evidence of knowledge on Hanlon's part. Hanlon however did bill Tidal for services on the Tagma loan, and sent the New York closing papers to Naslas at Tidal's offices in New York. The prosecution argued that guilty knowledge could be inferred from this conduct. A jury issue probably was raised, but the evidence hardly was overwhelming.

(f) We concede the sufficiency of the evidence against Hanlon to raise a jury question on the Aquario transaction. Hanlon knew the time charter was for 33 months, he received a copy of the false 42 month charter for delivery to the bank, and Flemming said Hanlon told him the charter was for 42 months, testimony which, if believed, could sustain the conviction on the Aquario. But there was a jury issue even with the Aquario. Hanlon denied the Flemming conversation and Flemming himself had not told of it when he was examined on the issue in an oral deposition where Flemming was a defendant and had high motivation to blame others. Hanlon also denied reading the 42 month charter which Livas sent him for submission on the Aquario's refinancing. His denials raised a jury question.

(g) We also concede the sufficiency of the evidence to raise a jury question on the Tekton and Tropis loans (Counts 51, 56, and 57). Patrick Martin, NBNA's attorney on the Tekton and Tropis loans, said that Hanlon told him that Scufalos was the borrower. Hanlon knew Tidal was the borrower. Further, in September 1970, stock in the subsidiaries which borrowed to purchase the Tekton and Tropis was transferred to Galaxy, another Tidal subsidiary.

The stockbook was in Hanlon's office. It contained a receipt from Galaxy signed by Hanlon's secretary, Anna Diaz (A. 697). If the jury believed Martin, then it could find Hanlon guilty. Moreover, if the jury believed that Hanlon knew of the transfer of stock to Galaxy in September 1970, and remembered it in December 1971, then its conviction of Hanlon is supportable. But, even at best from the prosecution's view, a meaningful jury issue existed to be decided after a fair summation and a balanced charge.

* * * * *

The evidence of knowledge was slim at best. Of the 26 false statement charges, only 6 were supported by evidence sufficient to raise a jury question, and even then only as to some defendants. For the reasons given, we believe the following accurately reflects the evidence:

(a) The evidence was insufficient against Katritsis on all 7 counts in which he was named.

(b) The evidence was insufficient against Naslas on all 6 of the false statement counts in which he was named.

(c) The evidence against Hanlon was insufficient on 6 of the 13 counts in which he was named. Counts 75 and 76 barely raised a jury question. Only Counts 51, 56, 57, 67, and 68, which involved the Aquario and the Tekton/Tropis loans, were supported by more than a bare minimum of proof.

In these circumstances, the application of the concurrent sentence doctrine must be questioned. See, *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966). Beyond that issue, and at the very least, the paucity of evidence against these defendants, caught as they were in a massive web of undenied fraud by others, required that both the prosecution and the trial court approach the issue of individual guilty knowledge with utmost care.

We believe neither did so. The prosecution's summation was distorted, it argued facts the prosecution knew to be

false, and it pressed untenable inferences which lacked factual predicate. It simply requested the jury to convict for negligence. Unfortunately, the court's instructions on knowledge invited the same impermissible verdict.

POINT II

The Court's incorrect charge with respect to knowledge permitted the jury to convict the defendants upon a finding of negligent conduct.

This trial was one in which a clear, fair, and unconfusing jury instruction on the issue of knowledge was essential. Furthermore, the magnitude and complexity of the transactions alleged made the need for such instruction especially vital. The situation here was quite similar to that in *United States* v. *Borelli,* 336 F.2d 376 (2d Cir. 1964), where Judge Friendly held that the complex circumstances in that case "required a more carefully defined submission to the jury" on the law of conspiracy as applied to the facts of that case, 336 F.2d at 380, and, in this connection, that detailed instruction must be given whenever "necessary to protect a defendant from *over-extension of a legal doctrine.*" 336 F.2d at 381.

However, far from presenting the knowledge issue fairly to the jury, the court's instruction, taken as a whole, had the effect of permitting the jury to convict these defendants upon a finding that they acted negligently in failing to ascertain the falsity of the statements in issue. This result followed largely from the court's use of what has been commonly referred to as the "reckless disregard" charge, but which in this case was not sufficiently balanced to protect the defendants against a finding based on negligence.

As a growing number of recent decisions of this Court reflect, the "reckless disregard" charge has been used with increasing frequency in this circuit in a wide variety of criminal cases. Such charges have been requested and been received in stolen check cases, *United States* v. *Bright,* 517

F.2d 584 (2d Cir. 1975), in narcotics cases, *United States* v. *Joly*, 493 F.2d 672 (2d Cir. 1974),* in false statement cases where specific fraudulent intent is not an element, *United States* v. *Sarantos*, 455 F.2d 877 (2d Cir. 1972), and in fraud cases such as this.

Originally, the recklessness charge appeared in cases where intent rather than knowledge was the contested issue. See, *United States* v. *Simon*, 425 F.2d 796, 812 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970).** Its extension into cases where knowledge rather than intent is the central issue has created increasing problems. As this Court recently has recognized, the use of the "reckless disregard" charge implies that something less than actual knowledge is sufficient to convict, and therefore tends effectively to lower the government's burden of proof and to obscure the vital distinction between liability for negligence and criminal liability for fraud. See, *United States* v. *Gentile*, 530 F.2d 461 (2d Cir. 1976); see also, *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975); *United States* v. *Jacobs*, 475 F.2d 270 (2d Cir. 1973); *United States* v. *Brawer*, 482 F.2d 117, 129 (2d Cir. 1973).

As a consequence, this Court repeatedly has stressed that if a "recklessness" charge is to be given, the trial judge must be scrupulously careful to balance the charge to effectively avoid the possibility that the requirement of actual knowledge will be eroded and a defendant convicted for negligence. This Court has carefully scrutinized such charges and in at least one instance has reversed for lack of the required sufficient balance. See, *United States* v.

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* We direct the Court's attention to Judge Weinstein's charge in *Joly*, which we believe was a fair and balanced statement of the issue.

** In *Simon*, the defendants had actual knowledge of prior liens on certain collateral. Armed with this knowledge, they nonetheless instructed a young auditor to confirm only the existence of the collateral and not the value of its remaining equity. The prosecution claimed that this failure to confirm what the defendants already knew, established that the defendants *intended* to commit a fraud. The recklessness charge in that case went to the issue of the intent with which the audit was performed and not to establish the defendants' knowledge.

Bright, supra. And in another case, this Court has relied upon the absence of the words "reckless disregard" and the use of the more appropriate "deliberate disregard" language as a basis for affirming a conviction that might otherwise have been reversed. See, *United States* v. *Gentile, supra.*

In this case, the prosecution throughout the trial and in its summation argued that the defendants had actual knowledge. It nevertheless submitted, as is the growing practice in this district, a "reckless disregard" charge.* The defense objected in writing to large portions of the prosecution's charge, as the court instructed it to do (See Court Ex. 19), and submitted its own request on the issue. The defendants' request read as follows:

> In deciding the question of whether a defendant had actual knowledge of falsity, you may consider as a factor the circumstance that the defendant was aware of a high probability that the statements made were false, fictitious or fraudulent. You may also consider whether the defendant acted with reckless disregard of whether the statements made were false and with a conscious purpose of avoiding the truth. If you find that such was the case, you may infer from those circumstances that the defendant had the knowledge which the offenses charged require and you may convict him of the offenses charged in the Counts I have just enumerated unless you find from all the evidence that the defendant actually believed the statements made were true. In short, a defendant may not be convicted on the Counts charging false statements if he actually believed the statements referred to in these counts were true, no matter how recklessly he may have acted. The fact

* It would seem that as a matter of procedural fairness, the prosecution, before it is allowed to rely upon a "reckless disregard" charge, should at least be compelled to argue that theory to the jury in its summation. When the prosecution does not make such a contention in its summation, defense counsel has no fair opportunity to respond to that theory of prosecution and it is therefore not until the court's instruction that the jury is first apprised of the "reckless disregard" concept. This result quite literally intrudes upon the Sixth Amendment right to the effective assistance of counsel.

> that that belief was unreasonable or even foolish, is of no consequence if you find that it was held in good faith (A. 1929).

This request was consistent with the decisions of this Court and may even have been more favorable to the prosecution than was required in that it contained the words "reckless disregard" rather than the words "deliberate disregard" which the *Gentile* case said was more appropriate. *See also, United States* v. *Joly, supra.* It was a balanced charge which presented the issue of knowledge fairly, assuming that a "reckless disregard" charge was to be given. The court refused to give this instruction and chose instead to incorporate the bulk of the prosecution's requested instructions. And while the trial court said it would give the prosecution's requested instructions only subject to excisions suggested by defense counsel (A. 1403-1405) the charge as given did not excise all of those portions of the prosecution's instructions on recklessness to which the defendants had objected.

The court instructed the jury on the issue of knowledge as follows:*

> (1) The second element of this false statement offense under Section 1014 is the subject of knowledge.
>
> (2) The government must establish beyond a reasonable doubt that the defendant whom you are considering knew the statement or report to be false or the security overvalued. Medical science as yet has devised no instrument by which you can go back and determine what purpose was in one's mind when he performed certain acts. Rarely is direct proof available that one had knowledge of a fact or intended to bring about a result. Now and then a person may commit himself in writing or make a statement in which he concedes that as of a certain time he had knowledge of the fact and that he acted with specific intent to achieve a specific result. But of course, that is rare, and is the exception rather than the rule.

*Paragraphs of the instruction are numbered for reference later in this POINT.

(3) The intent with which an act is done is often more clearly and conclusively shown by the act itself or by a series of acts than by words or explanations of the act long after its occurrence. Frequently, the acts of individuals speak their intentions more clearly than do their words.

(4) One may apply the old adage, "Actions speak louder than words."

(5) Accordingly, intent, willfullness and knowledge may be established by surrounding facts and circumstances as of the time acts occurred or events took place and the reasonable inferences to be drawn therefrom. This is referred to as circumstantial evidence and if believed, it is as acceptable as direct evidence.

(6) *Guilty knowledge cannot be established by demonstrating inadvertence, carelessness or other innocent reasons on the part of the defendant.* This applies wherever in this charge reference is made to knowledge and willfulness. *However, it is not necessary that the government prove to a certainty that a defendant whom you are considering knew any given fact or facts.*

(7) *The element of knowledge of a given fact under this false statement or overvalued security charge maybe satisfied by proof that a defendant acted with reckless disregard of what the truth was,* unless he actually believed the contrary to be true. One may not deliberately close his eyes to what otherwise would have been obvious to him.

(8) How does one go about determining whether a defendant knew that a given fact contained on a statement to a bank was false or that the value of certain security such as a vessel was overstated? This is a matter which may be inferred from other facts. Thus, if an individual was involved in loans on the same vessel at two different banks and factual representations were made in connection with the second loan which were inconsistent with representations made in connection with the first loan and the representations made in connection with the second loan were established to have been false, you might infer that such an individual *had knowledge of* the

false nature of the second representations *or acted in reckless disregard* of whether such representation was false.

(9) You may infer, if you feel such an inference to be justified, that by not attempting to resolve an inconsistency of this nature, *at the very least* an individual *had acted in reckless disregard* of whether or not a given fact was false.

(10) Similarly, you may infer from a person's involvement with a particular vessel, a particular charter or the particular transaction, that he had knowledge with relation to that vessel, charter, or transaction.

(11) With respect to Costas Naslas and Paul Katritsis, the government contended they had taken part or had knowledge of certain improprieties while employed at Tidal Marine. If you find this to have been the case, when Naslas or Katritsis signed documents which contained these statements of fact you may infer, if you choose, that such misstatements *either were done knowingly and deliberately or* that Naslas and/or Katritsis acted *with reckless disregard or reckless indifference* as to whether such representations were false.

(12) In the case of any particular situation you may ask yourselves did a defendant, because of his prior experience and his knowledge, act in *reckless disregard* of whether or not a given set of facts were false? If you conclude that he did, you may, if you wish, infer that he had knowledge of the false nature of such facts (Emphasis added).

This charge, when read as a whole, was totally inadequate to foreclose the possibility that the jury would convict for negligence and, indeed, was so unbalanced that the jury could only have concluded that negligence or gross negligence was sufficient to convict. It therefore failed to meet the standards set by this Court with respect to charges of this type. The charge, while using the term "reckless" six times in six consecutive paragraphs, referred only once to the fact that carelessness was not enough to convict.

And even that single reference was within the context of a boilerplate instruction on knowledge generally (para. 6).

Moreover, having charged that knowledge was a required element (paras. 1-6), the court concluded its generic charge by stating that "it is not necessary that the Government prove to a certainty that a defendant . . . knew any given fact or facts" (para. 6), and immediately told the jury that the "element of knowledge of a given fact" may be satisfied by proof "that a defendant acted with reckless disregard of what the truth was . . ." (para. 7).

The juxtaposition of these words clearly conveyed a lesser and alternative standard of criminal responsibility. The thrust of the instruction became (a) that knowledge must be proved, (b) that it need not be proved "to a certainty," and (c) that proof of a reckless disregard would suffice to convict.

The fatal misimpression created by this juxtaposition might have been avoided had the trial court given the balanced instruction of recklessness which the defense requested, which included the approved "awareness of high probability" language. But the trial court did not honor the defense request, and instead chose to instruct on "recklessness" in words which went well beyond what this Court has allowed.

Furthermore, the court's charge on "reckless disregard" was so heavily loaded in the prosecution's favor that it included instructions which were improper on what inferences could or could not be drawn.

For example, in telling the jury how it could determine whether a defendant knew certain statements were false, the court said the jury could infer knowledge from the circumstance that a person was present at two separate loan transactions at which inconsistent representations were made, assuming that the second representation was false (para. 8). This charge was demonstrably incorrect because an inference of knowledge would be proper only if the defendant both *knew of and remembered* the first statement when the second statement was made.

The prejudice resulting from these instructions was compounded by the court's succeeding instruction that the jury could infer "reckless disregard" by the mere failure to resolve inconsistencies.

The court also charged the jury that if the defendants Naslas and Katritsis knew of certain improprieties at Tidal Marine, then the jury could infer either knowledge of falsity or "reckless disregard" or "reckless indifference" (para. 11). The vagueness of the phrase "improprieties" made it impossible for the jury to fully understand how and in what way and what type of improprieties they were to consider as relevant on the question of knowledge.

Of even more consequence, by placing the terms "knowledge" and "reckless indifference" and "reckless disregard" in the disjunctive the court told the jury that a finding of any was a proper basis for conviction. In short, the court told the jury that a finding of recklessness was a substitute for actual knowledge. But this Court consistently has held that recklessness is only a means whereby *actual* knowledge may be inferred. It is not a substitute for actual knowledge.

Nor was this the only portion of the charge in which the jury was told, in effect, that recklessness was an independent basis for conviction. In the aforementioned paragraph dealing with inferences to be drawn from inconsistencies, the court said that the jury could infer either knowledge of falsity "or" reckless disregard as to all defendants (para. 11). By setting forth recklessness as something separate and apart from actual knowledge, the court reinforced the impression created by the entire charge that even if the jury was not convinced that the defendants had actual knowledge, the jury could nevertheless convict if they found the defendants were careless.

The charge, therefore, read as a whole, was extremely prejudicial and requires reversal. The only issue in the case was knowledge. The defendants were entitled to have that issue presented fairly to the jury. The charge submitted by the defense was balanced and objective and told the jury in unequivocal terms that mere negligence and

even gross negligence was not sufficient, as this Court has held. There was no reason for the court to refuse to give that charge.

Instead, the court gave a charge which was heavily laden with references to "reckless disregard", balanced by only one fleeting reference to the fact that carelessness was not enough, and that in the context of a boilerplate instruction on knowledge. All of the dangers as to which this Court has manifested increasing concern were thus present in this case. The court's instruction, rather than foreclosing the possibility of a conviction for negligence, had the obvious effect of insuring or at least inviting conviction on that basis, both on the fraud and false statement counts and, as argued *supra*, pp. 5-8, on the bribery counts as well.

POINT III

The prosecution summation requires reversal. It asserted as fact what it knew was untrue. It distorted other evidence. It called for conviction based on speculation and suspicion.

A general objection was made to the prosecution's summation and a mistrial was requested (A. 1615, 1717-34). The objection and request were meritorious. The prosecution's summation was grossly improper. It stated as true facts which the prosecutor knew were untrue. It contained prosecutorial testimony. It distorted the record and called for speculation to an impermissible degree. Like the court's instructions, it invited a verdict of guilt based upon negligence. We cannot brief every misstatement, distortion, and unfounded speculation. Examples of each follow, together with the request that the summation, direct and rebuttal, be read in its entirety (A. 1551-1615, 1685-1716). It requires reversal. See, *United States* v. *Bivona*, 487 F.2d 443, 447 (2d Cir. 1973); *United States* v. *White*, 486 F.2d 204 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974).

A. Speculation and Testimony

The first charge the prosecutor discussed related to the $4 million Bank of America (London) loan on the Trechon. Bustard, the loan officer, testified that Livas or Amanatides had represented the Trechon's purchase price to be $5.5 million (A. 210). Bustard denied that Hanlon was present when the representation was made and said that his acquaintance with Hanlon was no more than minimal (A. 212). The prosecution argued that Hanlon nonetheless *must have known* that the purchase price had been overstated since he knew (a) that the Trechon's true price was only $3.3 million, and (b) that banks would not loan money in excess of purchase price (A. 1557):

> In the first place, as Mr. Hanlon well knew, no bank would loan an amount of money in excess of the amount or even close to the amount that the seller had just finished selling the ship for, and the reason for this is obvious: that is the price for which the seller is willing to part with a ship is a good indicator of what its value is.

There was no evidence that banks would not make loans in excess of purchase price, much less that Hanlon knew it. To the contrary, one witness testified that a ship's value could more than double if it were chartered on favorable terms (A. 243). The Trechon itself was appraised at $6.6 million and Bustard said the loan was based on that appraisal (A. 213).

The prosecutor also argued Hanlon's knowledge of the price misrepresentation by reason of his review of the credit agreement which contained the 75% loan limitation. Since Hanlon never saw the credit agreement, even in draft, until a month after the loan closed (A. 1472-73, 1617-18), the prosecution's argument was pure and improper speculation. The prosecutor said (A. 1559):

> And, I think you can be quite sure that that letter from the Bank of America's attorneys did not come out of the blue; that the Bank had very good reasons to write to Mr. Hanlon concerning this line of credit

> agreement and that as Tidal Marine's attorney, James Hanlon was fully familiar with the existence and at least the basic terms of the line of credit agreement with Bank of America, and he knew very well that the Bank would not loan $4,000,000 if it exceeded 75 percent of the purchase price of the ship.

In his rebuttal summation the prosecutor reiterated (A. 1700):

> The question you have to ask yourselves is whether this letter to Mr. Hanlon, Tidal Marine's attorney, came just out of the blue, that Mr. Hanlon representing Tidal Marine in connection with the loan made pursuant to a contract, to a line of credit agreement, didn't know exactly what that line of credit agreement provided.

The prosecutor also argued that Tidal asked for $4 million on the Trechon in order "to pay off Mr. Hanlon for his services in perpetrating fraud in connection with [the Trechon] loan" (A. 1555). But there was no evidence that Hanlon served to perpetrate fraud on the Trechon loan. The $325,000 he received was for finding a $6.6 million vessel and was equal to that paid Sheneman who, as a prosecution witness, testified to the fairness of the finder's fee. Again, the prosecutor invited the jury to guess without evidence.

Speculation also was called for with regard to Hanlon's knowledge of Livas' representations to NBNA of a false purchase price for the Lion, Harilion, Marilion, and Kyrilion. In this instance, Hanlon purportedly knew just because he was Tidal's attorney. The prosecutor argued (A. 1562):

> I think the question you have to ask yourselves is whether it is possible—is it conceivable that Mr. Hanlon did not know what the purchase price of these ships was when that was exactly what this loan was about.
>
> Also ask yourselves whether in light of the fact that Mr. Hanlon dealt with the bank's lawyers everyday, whether it is possible, whether it is conceivable

> that he did not know what the bank thought the purchase price was.

The argument was blatantly improper. The false price representation appeared on none of the closing papers. There was no testimony from the bank's attorneys or anyone else that it had been mentioned to Hanlon. There was just no evidence to support the prosecutor's claim.

This was not the only call for speculation on this particular loan. Thus, in October 1970, at Blonsky's request, Hanlon formed a Tidal subsidiary with the name Unimar Seetransport GMBH. The Ilion charter in January 1971 was with Unimar Seetransport GMBH (A. 1371). With no evidence to support him, the prosecutor argued (A. 1564-1565):

> Now, ask yourselves what did Mr. Hanlon think when he discovered that it was being represented to the Bank that one of these ships was on a charter to Unimar?
>
> He tells you that although he spent over 100 hours in this transaction, he did not think at all. Well, I will say one thing. Mr. Hanlon surely did not think that the ship was on charter to the Unimar Seetransport Corporation which he had just formed for Tidal Marine two months earlier.
>
> Mr. Fleming: I object to that statement.
>
> The Court: The objection is overruled.
>
> Mr. Glekel: The fact is, and I think it is clear from the evidence, that Mr. Hanlon was well aware that the ship was not on charter to Unimar at all and, again, this Liberian shell corporation was formed for one and only one purpose, and that is to further the fraud.

"Clear" from what *evidence* seems an obvious question.

There likewise was no evidence that Hanlon knew of the Scufalos sham in connection with the six ship loan on August 11, 1971 at NBNA. Nevertheless, the prosecution urged the jury to make just such a finding. Its first argument was that Hanlon by his position as Tidal Marine's attorney *must have known* of the representation (A. 1570-1571).

> [I]t is rather curious that Mel Tublin, the bank's attorney, thought that Scufalos was the borrower. The Loan Committee thought Scufalos was the borrower. The loan officers of the Ship Loan Department thought Scufalos was the borrower and only James Hanlon, only the attorney representing the borrower, was kept in the dark as to the purported purpose of this loan.
>
> Indeed, Mark Scufalos actually guaranteed the loan and no one from Tidal Marine was even at the closing.
>
> The fact is, that Mr. Hanlon billed $9,000, that is ninety hours, for work performed in connection with the closing of this loan.
>
> He signed the loan agreement. He had discussions with bank attorneys in connection with this loan.
>
> Is there really any possibility at all that in all this time Mr. Hanlon did not become aware that the Bank was treating this loan as a Scufalos transaction?

The bank's attorneys, its loan committee, and the ship loan officers thought Scufalos was the borrower only because each had seen copies of the bank's internal and private loan fact sheet, which stated that Scufalos was the borrower. The fact sheet was not given to Hanlon however and indeed was unavailable to him. The bank's attorney testified that he did not tell Hanlon that the bank understood Scufalos to be the borrower on the loan (A. 679). Scufalos, the prosecution witness, said the same (A. 330). Amanatides also guaranteed the loan (A. 673). The prosecutor's claim that Hanlon might have been told by any of these people was grossly improper. It was flatly contrary to the evidence which the prosecutor himself adduced at trial.

The prosecutor also urged that Amanatides must have told Hanlon of the Scufalos sham in any event. There was no such evidence. The argument was rank speculation (A. 1572):

> If Harry Amanatides had not fully informed James Hanlon of the fraud that was being perpe-

> trated, it would have been absolutely inevitable that Mr. Hanlon would have disclosed to the Bank's attorneys either deliberately or accidentally that he thought he was representing Tidal Marine in connection with this loan and that Tidal Marine was the real borrower.
>
> Of course, such a disclosure would have destroyed the entire scheme and the entire fraud would have collapsed right at the start. It was essential, of course, that the scheme, that Mr. Hanlon appeared to be Mr. Scufalos' attorney in this loan transaction. Mr. Amanatides could not take the risk that Mr. Hanlon, as I say either deliberately or inadvertently, might have disclosed the fact he thought he was representing Tidal Marine.
>
> Neither could Amanatides take the risk that Mr. Hanlon, if he had not already been corrupted, would find out that the Bank viewed the loan as a Scufalos transaction, and have blown the whistle on the whole affair.
>
> I think you can see that the fact is that Mr. Hanlon knew exactly what was going on in connection with the fraud that was being committed.

The prosecutor made the same argument in his rebuttal summation (A. 1704):

> Again ask yourselves if Mr. Hanlon did not know of this fraud, how could Mr. Amanatides allow him, Mr. Hanlon to go into that Bank thinking he was Tidal Marine's attorney when the Bank thought he was representing Scufalos without risking the whole fraud being uncovered?

The prosecutor similarly urged that Katritsis knew the Tekton and Tropis charters were false because Katritsis had signed for Tidal on the unrelated charters presented on the August 1971 six ship loan (A. 1588). Those charters were proved to be false. But there was no evidence that Katritsis knew this. Delfos, an immunized prosecution witness, testified that she typed the charters for the six ships at Blonsky's direction. She did not incriminate Katritsis (A. 823-86). And Count 36, which concerned the six ship loan, did not name Katritsis as a

defendant, as would have been required if Katritsis knowingly signed false charters for that loan.

The argument on the Tekton and Tropis was pure subterfuge or worse, since the prosecution, which investigated the case, brought the indictment, and immunized Delfos, obviously knew that Katritsis was an innocent signatory of the earlier charters. If meant to imply that Katritsis was guilty on the six ship loan, this argument was a falsehood. If otherwise, as we would hope, then it was meaningless, since Katritsis' innocent signing of prior charters could prove nothing about his knowledge of the later Tekton and Tropis charters.

The argument of Naslas' knowledge on the Aris charter was a classic of speculation without proof (A. 1595):

> [Y]ou have to keep in mind that Mr. Naslas operated the ships. The charter was the most important aspect of their operation. The charters on the ships was the most important aspect of Tidal Marine.
>
> I submit to you that it is inconceivable that Mr. Naslas would not have been interested in the most essential term, that is the length of the charter, Tidal Marine was entering into, and that Harry Amanatides would not have discussed this new five-year charter, something that must have been of considerable value to Tidal Marine, given the depressed market.
>
> I suggest to you it is inconceivable that that was not discussed with Mr. Naslas and he was not fully aware of the five-year charter, the forged five-year charter that they had been representing was entered into.

There was no evidence at all that Naslas was in charge of the operation of the Aris. There was no evidence that Amanatides discussed its charter with Naslas, as the prosecutor asked the jury to find.

Impropriety was not limited to the false statement counts. On the bribery counts, Shevlin's testimony was really the only evidence against Naslas. The prosecutor sought to enhance Shevlin's credibility with an argument which was

grossly misleading and also improper in one other major respect (A. 1688).

> Moreover, I think you should realize that the only interest Mr. Shevlin had in testifying from that witness stand was in telling the truth. He certainly had no interest in incriminating and implicating Mr. Naslas.
>
> As you heard, he is presently awaiting sentence and you can be sure he does not expect the sentencing judge, Judge Pollack, to reward him for perjured testimony.

The prosecutor who made this argument had assisted in the grand jury investigation. He knew that Naslas was a target. He knew also that Shevlin's "cooperation" would be brought to the sentencing court's attention. He was present when just such a written representation was made to Shevlin's counsel before Shevlin ever implicated Naslas (A. 1590, 1729). It was misleading if not untruthful for the very same prosecutor to urge that Shevlin "had no interest in incriminating and implicating" Naslas.

It was even worse for the prosecutor to state that Shevlin "does not expect the sentencing judge, Judge Pollack, to reward him for perjured testimony." The statement improperly implied that Shevlin would only tell the truth before the trial judge, and in fact insinuated that the trial judge believed him. At the very least, the statement improperly introduced the trial judge into matters of credibility and for that reason alone was wrong.

The prosecutor also argued, as further examples of impropriety, that Katritsis *must have known* of falsity because he was Amanatides' "confidant" (A. 1414, 1454), that the only reason Hanlon would have formed a particular company, at Blonsky's request, was to supply false documents (A. 1425), and that "it must be clear" that corporations were formed to support fraudulent representations (A. 1429).

B. Facts Known To Be False

The first argument of false facts by the prosecutor was crucial to the question of guilt or innocence of Hanlon on the Tekton/Tropis loan. On that loan the actual BP charters were for a term of three years, while it was represented to NBNA that the charter term was for five years. Upon being asked whether he knew if BP had ever extended a ship charter from three to five years, Hanlon testified that he recalled BP had given just such extensions on the Ionic King and Ionic Queen in December 1971, the precise time of the Tekton/Tropis loan (A. 1526).

Hanlon was the last witness at trial. Over the weekend, defense counsel contacted counsel for BP and confirmed that BP in fact had extended its charters on the Ionic King and Ionic Queen from three to five years (A. 1893-96). On Monday, immediately prior to closing arguments, the prosecution admitted that a BP representative had confirmed the validity of addenda extending Tidal Marine's charters on the Ionic King and Ionic Queen from three to five years (A. 1893-96). It refused however to stipulate to the validity of those addenda.* Against this background, the prosecutor went right ahead and argued in summation (A. 1705-1706):

> Just briefly on the Tropis and the Tekton. It seems that Mr. Fleming's main argument, and perhaps the only argument here, is that somehow Mr. Hanlon thought that in some instances Tidal Marine ships had been extended from three years to five years charters, mentioning the Ionic King and the Ionic Queen.
>
> I suggest to you that the only evidence of that was Mr. Hanlon's rather vague testimony and that the—when the witness, MacKenzie, the employee, the guy in charge of chartering BP Tankers was called as a witness and testified from the witness stand, Mr.

*Judge Pollack had asked both sides to stipulate to undisputed facts. The defense had done so throughout the trial. The prosecution's unexplained refusal in this instance was, at the least, surprising, especially in view of the geography involved and the importance of the truth.

> Fleming never asked him whether the Ionic King and Ionic Queen were ever extended from three to five year charters. He didn't want to put that question to him.
>
> Mr. MacKenzie testified at the time in question, at the time the Tropis and Tekton, Tachys charters were entered into, BP would not enter into any five year charters, that they are not willing to do it.
>
> I suggest in addition Mr. Hanlon was well aware at the time of the Tropis and Tekton refinancings of the absolute impossibility of obtaining five year loans —obtaining a five year charter in a declining shipping market when ships were unemployed, without charters, and charterers were very reluctant to enter into long term charter agreements.

This consistent and pervasive misconduct was capped when the prosecutor dealt with Naslas' testimony that he had delivered Christmas photographs to Shevlin and Metzger in late December 1971 or early 1972, and that Amanatides shortly thereafter had told him, with raucous laughter, that Naslas would not be bothered by Shevlin anymore because the envelope containing the Christmas photographs also contained $10,000 each for Shevlin and Metzger (A. 1205). The prosecution argued, in a statement which he knew to be false (A. 1689):

> I submit to you that his [Naslas'] story, his testimony about delivering the envelopes of cash to the bank officers, and being told a second or two thereafter that they contained $10,000 in cash, is a clear fabrication invented and developed for no other reason than to meet the proof against him which *he had a full opportunity to listen to prior to his testimony* (Emphasis added).

The argument that Naslas had fabricated his testimony to meet the proof "which he had a full opportunity to listen to prior to his testimony" was false to the prosecution's knowledge. Naslas had said the very same thing in the presence of the same prosecutor on October 3, 1975 during a voluntary interview *four days before* Shevlin's lawyer

made Shevlin's deal and before Shevlin ever had incriminated Naslas (A. 1724-27, 1734-36). There can be no doubt about the prosecution's recollection. Notes of the October 3 Naslas interview were given to the defense shortly before the trial and were indeed the subject of litigation during the trial and before summation. This misstatement of a known fact went beyond the bribery charges. It labeled Naslas a recent fabricator, a liar, and therefore impacted Naslas' credibility on the false statement counts as well.

By arguing facts which he knew to be false, and which were prejudicial to the defendants, the prosecutor was guilty of misconduct which requires reversal. *See, United States* v. *Universita,* 298 F.2d 365 (2d Cir.), *cert. denied,* 370 U.S. 950 (1962).

POINT IV

Evidence of bribery was barred by collateral estoppel. The trial of the bribery counts was marred by error in any event.

Shevlin, the corrupt NBNA loan officer, said that Amanatides and Naslas had paid bribes to Metzger and himself between December 24, 1971 and late March 1972. His testimony is summarized at pp. 5-6, *supra,* and is set forth fully at A. 914-1064.

A. Collateral Estoppel

Amanatides, Naslas, Metzger, Spartalis, and Shevlin were named in the same Information, 75 Cr. 1176. Metzger pleaded not guilty. He was tried from March 29 through April 9, 1976, two months prior to Naslas' trial. Shevlin pleaded guilty and testified against Metzger. His testimony at the Metzger trial was identical to his testimony against Naslas at Naslas' trial. Metzger was found *not guilty* on all counts of the bribery information.

Principles of collateral estoppel apply in criminal cases. *Ashe* v. *Swenson,* 397 U.S. 436 (1969); *Scalfon* v. *United*

States, 332 U.S. 575 (1948); *United States* v. *Oppenheimer,* 242 U.S. 85 (1916); *United States* v. *Kramer,* 289 F.2d 909 (2d Cir. 1961); *United States* v. *Nash,* 447 F.2d 1382 (4th Cir. 1971); *United States* v. *Drevetzki,* 338 F. Supp. 403 (N.D. Ill. 1972).

The doctrine of collateral estoppel in criminal cases must be applied practically and with a rational eye to all the circumstances. The Supreme Court has said, *Ashe* v. *Swenson, supra,* 397 U.S. at 444:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration". The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings". *Sealfon* v. *United States,* 332 U.S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

Tested by these precepts, Metzger's acquittal constituted a complete and total repudiation by his jury of Shevlin's entire testimony about the alleged bribe payments. Shevlin testified to an agreement among Spartalis, Shevlin, and Metzger to receive $70,000 each in connection with future loans, to be received in installments over a period of time. Shevlin further testified that Metzger was present at four of the five alleged payments, including both of the occasions when Naslas allegedly paid $10,000 to Metzger and himself in each other's presence. Given these circumstances, it is

clear that Metzger's innocence or guilt on the counts which name Naslas, as a practical matter turned upon the jury's belief in Shevlin's testimony.

We may expect that the prosecution will conjure up a wide range of conceptual and speculative possibilities as to what else Metzger's jury may or may not have done. However, such an approach will bear little resemblance to the issues as they were actually argued and practically framed at Metzger's trial. Moreover, any such approach would ignore the clear injunction of the case law that the doctrine of collateral estoppel as applied in criminal cases is not to be an exercise in scholastic logic. See, *e.g. Sealfon, supra; Ashe, supra.*

It is of no moment that Naslas was not on trial at Metzger's trial. The prosecution chose to try Metzger first and alone. Mutuality of estoppel is no longer required in criminal or civil cases. The only requisite is that the government has had its day in court. *United States* v. *Bruno,* 333 F. Supp. 570 (E.D. Pa. 1971); *Zdanok* v. *Glidden,* 327 F.2d 944 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964); *United States* v. *Kramer,* 289 F.2d 909 (2d Cir. 1961); *United States* v. *Webber,* 396 F.2d 381 (3d Cir. 1968).

The reason no distinction exists between criminal and civil cases is obvious, since it makes no sense to afford a civil defendant greater protection than a criminal defendant, and since any such distinction plainly would be inconsistent with the spirit of due process. As Mr. Justice Holmes said in *United States* v. *Oppenheimer,* 242 U.S. 85, 87 (1916):

> It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.

See also, Ashe v. *Swenson, supra; United States* v. *Bruno, supra; Bis Vexari: New Trials and Successive Prosecutions,* 74 Harv. L. Rev. 1, 31-33 (1960).

Shevlin, Metzger, and Naslas were all named in the same information. The charges were identical. Shevlin's testi-

mony was identical. Its rejection affords the only "rational" and "practical" explanation of Metzger's acquittal. The prosecution chose to try Metzger first. It had its day in court, and it lost. Shevlin's rerun against Naslas was barred. His testimony should have been excluded. Without his testimony, the evidence of bribery by Naslas was insufficient. The bribery conviction should be reversed and the Information dismissed.

B. Error on the Trial of the Bribery Counts

1. *Cross-Examination of Shevlin*

Shevlin was *the* witness on bribery. NBNA conducted its own investigation after fraud was first discovered. Its counsel questioned Shevlin over 500 pages of Q. and A. transcript. The transcript was given to the government and was supplied to the defense under 18 U.S.C. 3500. There was never any question as to its authenticity.

Shevlin's Q. and A. was inconsistent with his trial testimony, not only with regard to bribery, but, even more significantly, with regard to Naslas' general association with the various ship financings.* Early in the trial, Judge Pollack told counsel that he wanted examination on prior questions and answers, usually in the grand jury, to be put in the usual way, namely, "Were you asked this question, and did you give this answer" (A. 456).

Shevlin was cross-examined for one hour on the afternoon of June 8. The next morning, defense counsel turned to Shevlin's Q. and A. statement to NBNA's counsel. Shevlin admitted giving the Q. and A. There followed a telling impeachment of Shevlin's trial testimony (A. 992-1034). The procedure was that directed by the trial judge, and indeed used as a matter of course for years in this

* No one could expect Shevlin to admit bribe-taking to NBNA's counsel before he had his deal with the prosecution. But there was no reason to leave Naslas out of the loan transactions, since Shevlin did put Amanatides and Livas in (See e.g. A. 992-95). His inconsistency in leaving Naslas out of the loan transactions therefore was of even greater value as impeachment of his general credibility.

district, namely "Were you asked this question and did you give this answer".

After approximately one hour of this type of cross-examination, and towards its close, the prosecution objected to the use of one prior question and answer on the ground that it was not inconsistent with Shevlin's trial testimony (A. 1035, 1888). The trial judge ignored the basis of the objection and for some unexpressed reason changed the rule he previously had announced. In the process the trial judge cast verbal doubt on the propriety of defense counsel's entire cross-examination, and created orally the impression that defense counsel was misleading the jury. The trial judge said:

(a) That "you have been rattling along with a lot of statements that you say are taken from sources for which there is no foundation" (A. 1034),

(b) That "the mere fact that you purported to be reading from something doesn't make what you are reading from correct evidence until it has been validated by somebody" (A. 1036), and

(c) That "you said you were reading these question and answers as inconsistent statements. You can't do that. They are not evidence. They haven't been acknowledged. There is no foundation for them" (A. 1037).

In fact, throughout the cross-examination based upon Shevlin's Q. and A. interrogation, Shevlin consistently had acknowledged, or "validated", his prior answers precisely as read by defense counsel.

It developed that Judge Pollack was referring to the antique and consistently disregarded common law rule of evidence that the witness must be *physically shown* the prior statement, and authenticate it, before the prior statement may be read in the jury's presence (A. 1035-37). Application of this antique procedure was at odds with the trial court's prior direction on the use of inconsistent testimony. It was particularly unnecessary since the prosecution had provided the Q. and A. transcript, and since

neither the prosecution nor the witness challenged its authenticity.

The court's unjustified implication that defense counsel had been improper throughout the earlier impeachment of Shevlin, and was attempting to mislead the jury, was obviously prejudicial. The jury did not know the rules of evidence. It could only accept what the court said, especially since Judge Pollack enforced a rule of silence on all counsel and allowed counsel to "speak" only in *written* notes to the court.

The intrusion was unfair, unfounded, and prejudicial both in its implicit attack on counsel's credibility before the jury generally, and in its negative effect on an impeachment of Shevlin which, until then, was showing results.

The impact of the court's curious interruption of the rhythm of counsel's cross-examination (see also, A. 1009-11) cannot be measured from the cold transcript. Suffice it to say, the impeachment of a key witness was obstructed and its impact on the jury was irretrievably lost. Moreover, defense counsel, who was pursuing a legitimate line of impeachment, was made to look improper and perhaps dishonest in the eyes of the jury. A mistrial was requested and denied (A. 1054, 1889). Cf. *United States* v. *Barash*, 365 F.2d 395, 396 (2d Cir. 1966).

2. *Summation*

The prosecutor argued that Naslas' testimony about the Christmas photographs, pp. 7-8, *supra*, was a fabrication designed to meet the testimony and evidence presented at the trial (A. 1689). This was false and the prosecutor knew it was false. See POINT III, *supra*, pp. 44-45. Naslas had said the very same thing in the presence of the same prosecutor on October 3, 1975 during a voluntary interview five days *before* Shevlin's lawyer made Shevlin's deal and before Shevlin ever had incriminated Naslas. There can be no doubt about the prosecutor's recollection. Notes of the October 3 Naslas interview were given to the defense shortly before the trial and were indeed the subject of litigation during the trial and before summation.

On summation, the prosecutor argued the exact opposite of what he knew to be the truth.

The prosecutor's knowing misstatement constituted a gross impropriety. Further, as we have already noted, his unwarranted statement in effect called Naslas a liar and therefore cast doubt on Naslas' credibility on the false statement and fraud counts, as well as on the bribery counts. This misrepresentation required a mistrial at the time (A. 1716-37), and requires reversal of at least the bribery counts now.

3. *Instructions*

The instructions on knowledge, as we have argued, *supra*, pp. 27-35; POINT II, *supra*, opened the possibility that Naslas was convicted of aiding and abetting bribery on a theory of recklessness. Naslas admitted cashing two $20,000 checks at Amanatides' direction on January 6 and 28, 1972. The instructions on knowledge allowed the jury to find that Naslas *should have known* the two checks were for an improper purpose, and therefore was guilty of aiding and abetting Amanatides by recklessly providing him with cash which Amanatides then gave to Shevlin.

* * * *

For any one of these reasons, Naslas' bribery convictions should be reversed. By reason of collateral estoppel, those counts should be dismissed. Because of prejudicial spillover, reversal of the bribery convictions should also require a new trial of the false statement and fraud counts.

POINT V

Other error added to the unfairness of the trial.

I. The attorney Flemming said Hanlon told him orally that the Aquario's charter was 42 months. This was the only testimony refuting Hanlon's testimony that he had not read the raised Aquario charter when he received it for delivery to NBNA. In a civil deposition where Flemming was a defendant he was asked if he had "undertaken

an investigation" of the Aquario charter when he represented NBNA on the Aquario refinancing. In response to this broad question, Flemming, charged with civil fraud swore: "We obtained certain documentation respecting the charter, yes." (A. 457). Flemming did not mention any conversation with Hanlon during which Hanlon, as Tidal's attorney, orally advised that the charter was 42 months.

When Flemming was confronted with this obvious inconsistency on a key point, the trial court interrupted almost *sua sponte,* and gave his opinion that the deposition testimony was not inconsistent because the deposition question did not expressly call for conversations with Hanlon or anyone (A. 457-58). The court was wrong and its mischaracterization was prejudicial. The deposition question was clearly designed to elicit any and all information that Flemming had as a result of his investigation of the Aquario charter. The court's mischaracterization also again implied that defense counsel was engaged in improper conduct designed to mislead the jury. Moreover, since defense counsel was not allowed to speak, the jury heard only one side of the issue, and that was the judge's side.

II. Naslas testified that he resigned from Tidal in November 1971 when he learned that Livas was to become Tidal's chairman. Naslas also testified that he had often told Amanatides he would have nothing to do with Tidal if Livas took a position of authority. This attitude towards Livas, the undisputed principal architect of the fraud, tended to show an innocent state of mind on Naslas' part at the time certain alleged offenses were committed, or at least the jury could have found. Moreover, as the trial judge charged, a defendant's trial testimony can be viewed as motivated by self-interest (A. 1820). Naslas therefore was entitled to corroborate his testimony of innocence, and to bolster his credibility, with all proper evidence.

Naslas' letter of resignation was offered as evidence for precisely this reason. The trial court excluded the letter however, except for the words "I wish to offer my resigna-

tion" (A. 1187-89, 1959). The letter should not have been excluded. It corroborated Naslas' trial testimony as to his reason for resigning, and therefore bolstered his general credibility as a witness. It constituted also a contemporary statement evidencing an innocent state of mind, made before any criminal investigation had begun, and therefore before there existed the ordinary motive to misrepresent.

The weight to be accorded the letter, if any, was a matter for the jury. *United States* v. *Matot,* 146 F.2d 197 (2d Cir. 1944). But it should not have been excluded. The decisions in this Circuit clearly indicate that a defendant should be given full leeway to present any evidence which might bear upon the issue of his state of mind, and that the trial court should err, if at all, on the side of the admissibility. As Judge Hand said in the *Matot* case, 146 F.2d at 198-99:

> The prosecution seeks to defend the exclusion on the theory that the testimony would have been "self-serving," and that it was not part of the "*res gestae.*" What else but "self-serving" the testimony of an accused person on his direct examination is likely to be, we find it difficult to understand; and as for "*res gestae,*" it is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms. Although Matot's testimony was the only direct evidence upon his intent, it was not fair to confine him to a bare denial—never impressive in the mouth of the accused. He was entitled to corroborate that denial by any conduct which confirmed it.
>
> * * *
>
> The exclusion of evidence, which does not too much entangle the issues and confuse the jury, merely because of its logical remoteness from the issue, is always a hazard, and is usually undesirable. It is always hard to say what reasonable people may deem logically material, and all doubts should be resolved in favor of admission, unless some definite rule, like that against hearsay makes that impossible. While

> in a clearer case we might disregard the error, it seems to us, so doubtful are we of the accused's guilt, that Matot should have been allowed whatever advantage the testimony might have given him.

If this Court reads Naslas' letter in full (A. 1958-59; Exh. T), we believe the prejudice of its exclusion will be apparent.

III. The court allowed cross-examination of Hanlon on trips to Greece after the investigation began but before indictment. Hanlon was still Amanatides' attorney during that time. Evidence of the trips had no probative value, yet the prosecutor used them to insinuate continuing impropriety on Hanlon's part (A. 1440). Hanlon's association with Amanatides was conceded. His current relationship, absent evidence of wrongdoing, had no probative value.

Hanlon's defense was that, not withstanding his close association with Amanatides, he had no knowledge of the frauds being perpetrated at Tidal by Amanatides and others. Evidence of Hanlon's *present* association with Amanatides cast no light upon his knowledge at an earlier period of time and could have only created in the jury's mind the impression that since Hanlon had not abandoned his relationship with Amanatides upon his discovery of the fraud, he was guilty of the crimes charged. But this is a totally improper inference and the evidence should have been excluded, especially since, as noted and as not really disputed, the attorney-client relationship between Hanlon and Amanatides continued long after the investigation began.

These errors, while perhaps not reversible in isolation, contributed as a whole, and together with the more major points previously briefed, to a trial which was unfair and requires reversal.

Conclusion

Fraud and false statement counts 10, 18, 22, 36, 62, and 63 as to all defendants, and 51, 56, 57, 58, 59, 65, 66, and 76 as to Katritsis and Naslas, and all of the bribery counts should be dismissed. A new trial should be ordered on fraud and false statement counts 51, 56, 57, 67, 68, 75 and 76 as to Hanlon. Appropriate directions on recklessness instructions should issue.

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Respectfully submitted,

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